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IN THE

Supreme Court of The United States

OCTOBER TERM, 1962

NO. 66

JAMES RUSSELL ROBINSON, JOSEPH PEACE PERKINS, MARVIN EDISON ROBINSON, THOMAS YAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE B. BUTLER, HENRY PRINGLE, REGINALD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY L. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT LANGER, JR.,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

RICHARD W. ERVIN
Attorney General

GEORGE R. GROSSETTA
Assistant Attorney General

Counsel for the Appellee.

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STATUTES

FLORIDA STATUTES:
Section 509.141 — 2, 3

IN THE

Supreme Court of The United States

OCTOBER TERM, 1962

NO. 748

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

-vs-

THE STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

Comes now the State of Florida, appellee in the above styled cause and in the interest of brevity, concedes that the appeal sought in this cause is from the opinion of the Supreme Court of Florida rendered on the 19th day of September, 1962, and reported in Florida, 144 So. 2d 811.

Appellee further concedes that the legislation involved and here under assault by this appeal is as represented by appellants, that is to say, **Section 509.141, Florida Statutes.**

Appellee accepts appellants' statement of the substantive facts and procedural steps set out in their jurisdictional statement at pages three through five only insofar as they reflect a true and correct resume of what the record in this cause would reveal. Appellee will make no changes therein except insofar as it may become necessary in its discussion post.

QUESTION PRESENTED

WHETHER SECTION 509.141, FLORIDA STATUTES, EITHER ON ITS FACE OR BY VIRTUE OF ITS APPLICATION TO APPELLANTS IN THIS CASE, CONSTITUTES A VIOLATION OF EITHER THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND A VIOLATION OF THE PRIVILEGES AND IMMUNITIES OF STATE AND FEDERAL CITIZENSHIP LIKEWISE ASSURED BY THE UNITED STATES CONSTITUTION.

JURISDICTION

Pursuant to the Revised Rules of this Court: specifically Rule 16 thereof, appellee moves to dismiss and/or affirm the appeal in this cause for the reason that even if the issue is as posed by appellants, it is manifest that said issue does not present a substantial federal question nor is the issue on which the decision of the cause depends one

of a substantial nature upon which this Court should pass.

Appellants would seek, by virtue of this Court's pronouncements in the case of **Shelley v. Kramer,** 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), to bring themselves within its protective pale. The logical progression by which they seek to align themselves therewith is at least arcane. Few, if indeed any among us would quarrel with the pronouncements of this Court in the **Kramer** case, supra. Virtually everyone however should stand ready to gainsay the application of the principles to be found therein to the case at bar. The **Kramer** decision, supra, was based upon the undeniable fact that a racial restrictive covenant was sought to be enforced by a party to said covenant who sought to enjoin the sale by another owner in a subdivision to a negro purchaser. By no stretch of the imagination could it be said that the rationale of that decision now compels a private restaurant keeper to contract to serve people in his establishment when to do so, in his opinion, would bring his establishment into disrepute, damage his business and perhaps ruin him insofar as future success (in any degree) were concerned. Moreover, the unequivocal proviso made a part of the restrictive covenant in the **Kramer** case, supra, was an open announcement to all those who became party thereto that any violation thereof would be condemned or enjoined with the aid of the state courts in that case. That is discrimination (for its own sake) based solely upon race or color such as has been, is being and, in all likelihood, will continue to be condemned by this tribunal.

However, when **Section 509.141,** supra, is placed in jux-

taposition with the restrictive covenant in the **Kramer** case, supra (however tortured its reading may be), one simply cannot find a reference to any ethnic, racial, religious, or color group as being the admitted or covert object thereof. In short, said legislation was passed to and does no more than operate across the board without regard to persons or their physical status *when in the opinion of the management of the enumerated establishments it would be considered detrimental to such establishments to continue to entertain them or their business on the premises.*

This may best be illustrated by a reasonable hypothetical, to-wit: suppose a group of unruly, white Anglo-Saxons whose presence could not be denied were to present themselves at this same establishment and demand to be served; suppose further that the same result obtained as did here, would such action be not equally subject to condemnation as a deprivation of equal protection as is that sought to be maintained here—we think that the answer thereto must be an unqualified "no." Who could, in good conscience, quarrel with the unbridled right of the management to request their departure and seek to buttress that request with whatever law enforcement was necessary in the circumstances? His quality judgment in that circumstance is in nowise different than that employed here. His action here was not any more discriminatory than would have been his action with reference to the threat posed to his business by these hypothetical parties.

Whatever view one may take of the moral and sociological reasons which many consider constitute a compelling reason to over-ride prejudice, it is simply not correct

to conclude that the wishes of any given individual must be preserved over the general right of other individuals to contract only as they see fit. That is all this legislation has ever sought to insure—that the enumerated principals of the legislation shall have a right under the aforesaid section to contract only as it suited them.

Adverting once again to **Kramer**, supra, we think it patently clear that but for the specific restrictive covenant, no disgruntled potential buyer; whatever his race, would have been heard to complain of a deprivation of any federally insured rights simply because property owners refused to sell to him on the basis of his race. So it is that the specific provisos of the restrictive covenant in **Kramer**, supra, were made the touchstone of this Court's rationale in ruling as it did therein. In comparison, since there is no mention whatever of any specific classes of people to whom this legislation is intended to apply, we consider that it follows as a matter of course that it had no such purpose as its object but rather to simply codify that which had long been a right enjoyed by the citizens of this and every other state, to-wit, to contract only as and when it suited their fancy. If it incidentally results in a refusal to contract with negroes because they are negroes, it is not to be condemned as racially discriminatory legislation. As a necessary corollary, we consider that it follows that if private business enterprises not engaged in interstate commerce always enjoyed the right to contract as they chose, then this legislation conferred no new rights in that regard. It further follows that their wish to enjoy rights admittedly theirs cannot and should not be thwarted by any individual who insists upon an alleged right (which has never been

his) to enter into a contract with someone without regard to whether that someone cares to so contract.

Certainly **Valle v. Stengle**, 176 F.2d 697 (1949), lends appellants no support inasmuch as the tickets to the Palisades Amusement Park (which was engaged in interstate commerce) had already been sold to the parties involved and they were later denied the right to exchange those tickets for swimming privileges—in direct violation of a New Jersey statute which forbade such action, to-wit: R.S. 10:1-2, N.J.S.A. In short, this was a condition based upon race alone sought to be implemented after the contract had been consumated, hardly the situation here. In the case at bar, it was simply a situation wherein the proprietors elected not to contract with the parties bringing this appeal. The State of Florida has not lent legal substance to their right to discriminate in contravention to the Fourteenth Amendment to the United States Constitution but rather upheld their undeniable right to contract only as and when they considered it to be in their best interest. Since the legislative codification pursuant to which these proprietors exercised the right which had long been theirs is not itself discriminatory in any way, it follows that their rights to freely contract may not be abridged by another's wish to insist upon a contract contrary to that right. It is for this reason that the Florida Supreme Court found it completely unnecessary to pass upon anything but the validity of the legislation in question. In finding as they did that it was not invalid, they were at least correct.

Nor does the case of **Marsh v. Alabama**, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946), pose any obstacle to the

correctness of the decision of the Florida Supreme Court. This is not a question of whether rights may be enjoyed on private property nor the state's indulgence of corporate bridling of fundamental liberties under the imprimature of state legislation, but rather the plain and simple judicial guarantee that one's right to contract shall never be made any more coerced by law than said individual's wish to contract—a guarantee that he shall never be duty-bound to contract with those whose offers do not satisfy him for any or no reasons.

Nor is this the situation which perhaps appeared in **Garner v. Louisiana**, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961). For aught that appears, it seems the licensing authority there involved sought to limit the use of the facilities in question on the basis of race—that was clearly state action calculated to deprive the omitted racial groups from privileges which apparently were extended to others not so situated. Here we have nothing bearing even any remote similarity thereto.

CONCLUSION

WHEREFORE, whether this Court views the matter in appellants' or appellee's light, it follows that, based upon the signal deficiencies to which we have adverted, the motion to dismiss should be granted, or, in the alternative, the action of the Florida Supreme Court should be affirmed.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

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Assistant Attorney General
Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Motion to Dismiss or Affirm in Response to Appellants' Jurisdictional Statement to the Honorable Tobias Simon, 233 Southeast First Street, Miami, Florida, counsel for the appellants, by mail, this ..... day of March, 1963.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.